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VESTED AND CONTINGENT REMAINDERS.

IN the course of the able and successful work accomplished by the framers of the revision of 1830, they drafted one section[1] relating to future estates, which has been, for many years, the source of considerable confusion.

It will be remembered that Blackstone defines vested and contingent remainders as follows: Vested remainders exist "where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent;" contingent remainders exist "where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event."[2] Other common law writers gave definitions varying somewhat from these in form, but those just quoted furnish a convenient, and, at least for present purposes, a correct, statement of the law.

To render a remainder vested, therefore (either absolutely or subject to being wholly or in part divested, according to the nature of the given case), the event upon which the remainder was limited to take effect must not be dubious or uncertain in the sense intended by the definition, and the person to whom the future estate is fixed to remain must be "determinate," and as a general proposition this necessary determinateness could only be achieved by designating him, in the instrument creating the remain-

[1] 1 R. S. 723, § 13; Real Prop. Law, § 30.

[2] 2 Comm. 168, 169.

der, in terms applicable to him even while the particular estate continued.

For example, under a grant to A for life, remainder to the "children" of B, the remainder vested in B's children. But under a grant to A for life, remainder to the "heirs" of B, a living person with issue, no "determinate person" was named, for there could be no heirs of a living person, and for this reason, as well as for the reason that the particular estate might cease before B's children acquired the character of heirs, the remainder, while B lived, continued contingent. If B died during the continuance of the particular estate, the remainder in question would at once vest in his issue, because, by the fact of his death, they had become "heirs," and thus, for the first time, answered to the description in the instrument.

It should be noticed, in passing, that in any given instrument the grant or devise might be so worded as to render it clear that the term "heirs" was used inartificially, and was intended to refer to particular individuals, in which case the remaindermen might be determinate, and the remainder vested.[1] And so with other words which, if used in a technical sense, would be indeterminate.

Now the revisers, in connection with their general plan, phrased their definitions to cover all future estates, and to provide, while leaving the definition affecting contingent estates otherwise unchanged in substance, that future estates "are vested when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."[2] The form thus adopted followed almost exactly the definitions of numerous common law writers to express the same meaning expressed in other words by Blackstone.[3] It will be seen that the question whether contrary to settled construction, the definition thus adopted is to be read literally, may sometimes be of great importance.

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[1] See Heard *v.* Horton, 1 Denio, 168; Cushman *v.* Horton, 59 N. Y. 149.

[2] 1 R. S. 723, § 13; Real Prop. Law, § 30.

[3] See Fearne, Contingent Remainders (10th Ed.), 215, 216; Greenleaf's Cruise (2d Ed.), I, 712; Challis, Real Property, 56; Preston, Abstracts of Title, II, 113; 4 Kent Comm., 202; *Id.* (12th Ed.), 203, note 1; 2 Washb. Real Prop., 229.

Taken literally, it would mean that it is now quite immaterial whether the terms used to designate the remainderman constitute a correct present description or not, and that the sole test of the vested character of the remainder, so far as concerns the point under discussion, consists in the existence of a person who, if the precedent estate were now to cease, would at once be entitled to possession.

Under this view of the statute, a grant to A for life, remainder to his heirs, in fee (which at common law, through the operation of the rule in Shelley's case, would have given a fee to A himself), would (by virtue of the abolition of that rule in New York,[1] and the consequent recognition of a valid remainder in his heirs) render the remainder vested in his children, because they, although not yet "heirs," would unquestionably be persons in being who, if the life estate were now to cease, would immediately be entitled to the possession.

This view of the statute was fully set forth by Judge Woodruff in Moore *v.* Littel,[2] as follows:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' then that remainder is vested, within the terms of the statute. It is not 'a person who *now has* a present fixed right of future possession or enjoyment,' but a person who *would* have an immediate right if the precedent estate were now to cease. * * * 'When there is a person in being,' means when you can point to a human being—man, woman or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman or child who, if the precedent estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested."

The purpose of the present article is not to question the perfect correctness, on other grounds, of the decision in Moore *v.* Littel,[3] or in any of the other cases to be cited, but to ascertain whether the particular and sweeping construction thus given to the statute by Judge Woodruff,

[1] 1 R. S. 725, § 28; Real Prop. Law, § 44.

[2] 41 N. Y. 66.

[3] 41 N. Y. 66.

which involves the startling proposition set forth by Chief Justice Savage,[1] that some remainders are both contingent and vested at the same moment, has in fact been adopted and established by the courts as an inflexible and invariable rule.

Moore *v.* Littel was decided in 1869. In the previous year the same Court, in Carmichael *v.* Carmichael,[2] had held that a devise to testator's wife for life, and from and after her decease to testator's children who might "then be living," created a mere contingent remainder in the children during the life of the widow. And in 1881, in Hennessy *v.* Patterson,[3] it was held that a certain expectant estate devised to one Foley, who would have become immediately entitled to possession if a certain Margaret, who was then in enjoyment of the lands and who had no issue, had then died, was a contingent remainder because, notwithstanding these facts, Foley was, by the terms of the instrument creating the remainder, to become entitled thereto only in case Margaret should die without issue. And in that case the Court say that the *doctrine* set forth by Judge Woodruff in Moore *v.* Littel, "was not assented to by three of the Judges, and the case (of Moore *v.* Littel) was really decided upon the ground * * * that the remainder was contingent."

In Minot *v.* Minot,[4] a testator devised lands in trust for his widow, with remainder "to those persons who, if my death occurred at the time of her death, would then be my heirs at law by blood." When the will was executed, he had no issue, but subsequently, and before his death, a son was born. Testator thereafter died, leaving a widow and the son surviving. The question was presented, whether this son was "provided for" by the will, so as to obviate the result of a so-called revocation. It was held that the son, upon the death of the testator, took a vested remainder. The case hardly raises the question now under discussion, because the son did unquestionably answer to the description of "heir," his father being dead, and in favor of vesting

[1] Coster *v.* Lorillard, 14 Wend. 302, 310, 311.

[2] 1 Abb. Ct. App. Dec. 309 (4 Keyes, 346).

[3] 85 N. Y. 91.

[4] 17 App. Div. 521.

he was properly to be regarded as presumptively the person who would be such heir when the widow should die. But the present importance of the opinion in the case lies in its discussion of the principle involved in the decision of Hennessy *v.* Patterson.[1] "The remainder in question there," say the Court, "was created in these words: 'Should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley.' It was held by the Court that the remainder in question in that case was a contingent and not a vested remainder. This estate is precisely within the definition of a contingent remainder, as given by the Revised Statutes, which is whenever the person to whom, or the event upon which, the future estate is limited to take effect, remains uncertain. * * * And while Foley *was undoubtedly the person who would have an immediate right to the possession of the land* upon the ceasing of the precedent estate, yet the certainty of his designation *did not do away with the uncertainty of the event* upon which alone his estate would vest, and therefore the remainder to him was clearly contingent."

And finally, in Paget *v.* Melcher,[2] there was a grant of land to a trustee in trust for the grantor's wife for her life, and upon her death to convey to his children, or, if they were deceased, to their issue, or, in the default at that time of any issue of the grantor, to other persons designated. The grantor died, leaving a widow and three children. Thereafter Henry, one of these children, died, leaving no issue, and then the widow died. Here, after the grantor's death, and during the life of Henry, the latter was a person who would have become entitled, if the widow had then died, to a share of the property. But it was held that his estate, at that time, was not vested, but contingent. It is true that there was a formal requirement of a conveyance by the trustees, instead of a direct grant in remainder, a feature discussed at length in the peculiar case of Townshend *v.* Frommer.[3] But whatever else may be said on that subject, it remains true that during the life of the first taker there was a person in being who, if the prior estate had

[1] *Supra.*

[2] 156 N. Y. 399.

[3] 125 N. Y. 446. Compare Campbell *v.* Stokes, 142 N. Y. 23.

then ceased, would have been entitled to immediate possession, the statute,[1] even though previously dormant, operating to vest title in him without the necessity of any conveyance by the trustees. And the Court recognizes that Henry and the other children held future *estates*, for in summing up their discussion they say that "it follows that their *estates* were contingent."

An interesting and valuable discussion of the case of Moore *v.* Littel[2] will be found in Mr. Fowler's learned work on the Real Property Law,[3] where it is treated in connection with a question quite different from that under consideration, and where the conclusion (which, if confined to the result arrived at by the Court, and not applied to the broad doctrine enunciated by Judge Woodruff, seems perfectly sound) is arrived at, that the case was correctly decided. This conclusion is confirmed by the opinion in Hennessy *v.* Patterson,[4] where the Court say that the real point decided in Moore *v.* Littel was merely that the remainder, although contingent, was alienable.

The proposition thus laid down, that the decision in Moore *v.* Littel really turned on the question not whether the remainder was vested or contingent, but whether, although contingent, it was alienable, applies to many of the cases which have cited or followed Moore *v.* Littel; and such of them as are not to be explained on this ground rest on considerations quite apart from the sweeping terms of Judge Woodruff's dictum. Thus in Byrnes *v.* Stilwell[5] the remainder was devised to "the lawful child or children" of the life tenant, or if any of them should die before the life tenant, then to their issue. In Surdam *v.* Cornell,[6] there was a devise to testator's widow for life, and after her death to his children, in equal shares, for their respective lives, and upon the death of a child, its share was devised to his or her "heirs" in fee, and the testator then proceeds to

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[1] Real Prop. Law, § 79. See Townshend *v.* Frommer, 125 N. Y. at pp. 459, 461.

[2] 41 N. Y. 66.

[3] § 30, pp. 137–142.

[4] 85 N. Y. 91.

[5] 103 N. Y. 453.

[6] 116 N. Y. 305.

define this word "heirs" as meaning the children of his own children. In Campbell *v.* Stokes,[1] the testator devised lands to trustees in trust for his children, and directed them, upon the death of a child, to convey its respective share to its "lawful issue." And in Losey *v.* Stanley,[2] the testatrix devised lands in trust for her son, for his life, with remainder to his "children" or their descendants living at his death.[3]

The final result seems to be that the cases do not establish Judge Woodruff's opinion that a remainder must *necessarily* be vested *merely* because (regardless of the terms of description employed in the instrument to designate the remainderman), there is a human being in existence who (though not now answering to the description employed) would, under the terms of the instrument, become immediately entitled to possession if the precedent estate were now to cease.

STEWART CHAPLIN.

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[1] 142 N. Y. 23.

[2] 147 N. Y. 560. See also Matter of Brown, 154 N. Y. 313, at pp. 322, 323.

[3] With the cases last cited compare Matter of Crane, 164 N. Y. 71.